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Attorneys for Defendant Flo Health, Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ERIC FRASCO et al., individually and on behalf of all others similarly situated,

Plaintiffs,

V.

ELO HEALTH, INC., et al.

Defendants.

Case No. 3:21-CV-00757-JD

**FLO'S MOTION IN LIMINE NO. 2 TO
EXCLUDE EVIDENCE AND ARGUMENT
THAT CONTRADICTS BINDING JUDICIAL
ADMISSIONS IN PLAINTIFFS'
COMPLAINT**

Date: June 26, 2025

Time: 1:30 P.M.

Judge: Hon. James Donato

Ctrm: 11 – 19th Floor, SF

1 **I. INTRODUCTION**

2 Flo moves to exclude evidence and argument from Plaintiffs that contradict *Plaintiffs' own Complaint*,
 3 where they expressly admitted—without hedge or caveat—that they agreed to Flo's Terms of Use and Privacy
 4 Policy. These are not allegations made *against* them. They are factual assertions made *by* them. It is black-letter
 5 law that “[f]actual assertions in pleadings and pretrial orders, unless amended, are considered judicial
 6 admissions conclusively binding on the party who made them.” *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d
 7 224, 226 (9th Cir. 1988). Indeed, *according to Plaintiffs*:

- 8 • “Plaintiffs entered into a contract with Flo Health by downloading and using the Flo App. In
 9 connection with using the Flo App, both parties ***agreed to abide by Flo Health's Terms of Use*** (“TOU”).” Dkt. No. 64, Compl. ¶ 289.
- 10 • “Plaintiffs and Defendant Flo Health are ***subject to Flo Health's Privacy Policy***, which is
 11 incorporated into the TOU.” *Id.* ¶ 290.

12 Moreover, at their depositions, each named Plaintiff reaffirmed what their Complaint already made
 13 clear: they agreed to be bound by Flo's Terms of Use and Privacy Policy. *See infra* p. 2. Having admitted in the
 14 Complaint (and, again, under oath at deposition) that they agreed to be bound by Flo's Terms of Use and the
 15 Privacy Policy, the law does not permit Plaintiffs to back away from those admissions at trial. Accordingly, Flo
 16 respectfully requests that this Court preclude Plaintiffs from attempting to do (as they already sought to do in
 17 opposing Summary Judgment).

18 **II. ARGUMENT**

19 Binding precedent from the Ninth Circuit is unambiguous: “[j]udicial admissions are formal
 20 admissions in the pleading which have the effect of withdrawing a fact from issue and dispensing wholly with
 21 the need for proof of the fact.” *Am. Title Ins. Co.*, 861 F.2d 224 at 226. In other words, “[f]actual assertions in
 22 pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the
 23 party who made them.” *Id.* In their Complaint, Plaintiffs alleged—in no uncertain terms and not once, but
 24 ***several times*** throughout the Complaint—that they agreed to be bound by Flo's Terms of Use and Privacy
 25 Policies. *See* Dkt. No. 64, Compl. ¶ 258 (describing the Terms of Use as “a legal agreement between [users]
 26 and Flo Health, Inc.” (citations omitted, alterations in original)); *id.* ¶ 289 (“Plaintiffs entered into a contract
 27 with Flo Health by downloading and using the Flo App. In connection with using the Flo App, both parties
 28 agree to abide by Flo Health's Terms of Use (“TOU”).”); *id.* ¶ 300 (“In connection with using the Flo App,

1 both parties agreed to abide by Flo Health's Terms of Use ("TOU")."); *id.* ¶ 290 ("Plaintiffs and Defendant
 2 Flo Health are subject to Flo Health's Privacy Policy, which is incorporated into the TOU.").

3 These allegations make sense; at deposition, each of the named Plaintiffs testified that that they agreed
 4 to be bound by Flo Health's Privacy Policy and Terms of Service:

5 **Jennifer Chen (Ex. A, Chen Tr. at 213:14-18 (objections omitted))**

6 Q. So you told Flo you agreed to the privacy policy and terms of service, correct?

7 A. Yeah, with regard to that, yes.

8 **Erica Frasco (Ex. B, Frasco Tr. at 148:17-149:1 (objections omitted))**

9 Q. And by continuing, you told Flo that you agreed to its privacy policy, right?

10 A. Yes.

11 Q. And you told Flo that you agreed to its terms of service?

12 A. Yes.

13 **Tesha Gamino (Ex. C, Gamino Tr. at 315:6-12 (objections omitted))**

14 Q. You have to consent to the terms of an app before you start using the app, right?

15 A. Correct

16 Q. And that was true of Flo Health, right?

17 A. Okay. Sure.

18 **Autumn Meigs (Ex. D, Meigs Vol. II Tr. 308:9-19 (objections omitted))**

19 Q. Now, understanding how the Flo app works, can we agree you told Flo on the consent screen
 20 that you have before you right now that you agreed to its privacy policy?

21 A. I guess so.

22 Q. And you also agreed to its terms of service, correct?

23 A. Yes.

24 **Sarah Wellman (Ex. E, Wellman Tr. 257:15-21)**

25 Q. So you told Flo that you agreed to its privacy policy, right?

26 A. Yes.

27 Q. And you told Flo that you agreed to the terms of use, correct?

28 A. Yes.

1 Thus, though the allegations in the Complaint, standing alone, are sufficient to conclusively establish
 2 that Plaintiffs agreed to Flo's Terms of Use and Privacy Policy, the fact that those allegations are entirely
 3 consistent with the named Plaintiffs' sworn testimony underscores that there is no principled basis in fact or
 4 in law for Plaintiffs to be permitted to argue otherwise at trial.

5 Any arguments to the contrary are unavailing. At no time in the last four years, for example, have
 6 Plaintiffs sought to amend those allegations, or claimed that the allegations in the operative complaint were
 7 the results of mistake or inadvertence. *See Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995)
 8 (“Where, however, the party making an ostensible judicial admission explains the error in a subsequent
 9 pleading or by amendment, the trial court must accord the explanation due weight.”); *see also Atencio v.*
 10 *TuneCore, Inc.*, 843 Fed. Appx. 42, 44 (9th Cir. 2021) (affirming district’s determination that plaintiffs’
 11 “[f]actual assertions in [their] pleadings . . . are considered judicial admissions conclusively binding on them”
 12 and that plaintiffs “did not diligently seek leave to amend their complaint”). Nor could Plaintiffs claim that
 13 the allegations were “made before counsel had the opportunity to investigate the facts and theories of the case,”
 14 as Plaintiffs filed their Consolidated Class Action Complaint *nine months* after the first Class Action complaint
 15 was filed, affording Plaintiffs ample time to investigate and develop the underpinnings of their claims.
 16 *Matthews v. Xerox Corp.*, 319 F. Supp. 2d 1166, 1171 (S.D. Cal. 2004).

17 To be sure, the allegations that Plaintiffs agreed to the Terms of Use and Privacy Policy are of core
 18 relevance to establishing one of their pending claims against Flo for breach of contract. That is because, for
 19 such a claim to exist, there must be a valid contract between Flo and Plaintiffs. That contract, according to the
 20 Complaint, is the Privacy Policy. Dkt. No. 64, Compl. ¶ 290. Here again, under California law, because “an
 21 admission that a plaintiff is a party to a contract . . . is binding on the party that made it,” Plaintiffs cannot walk
 22 away from that admission at trial. *Ronches v. Dickerson Emp. Benefits, Inc.*, 2010 WL 11508128, at *6 (C.D.
 23 Cal. May 24, 2010); *accord, e.g., Coll. of the Sequoias Farm v. White Gold Assoc., Inc.*, 2007 WL 2022040,
 24 at *17-18 (E.D. Cal. July 9, 2007). “Such admissions . . . have the effect of withdrawing a fact from issue and
 25 dispensing wholly with the need for proof of the fact.” *United States v. Davis*, 332 F.3d 1163, 1168 (9th Cir.
 26 2003).

27 For these reasons, Flo’s Motion in Limine No. 2 should be granted.
 28

1 Dated: June 3, 2025

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ERIC FRASCO, et al.,)
Plaintiffs,)
vs.) Case No.
FLO HEALTH, INC., GOOGLE,) 3:21-cv-00757-JD
LLC, FACEBOOK, INC., and) (consolidated)
FLURRY, INC.,)
Defendants.)
)

*** CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER ***

VIDEOTAPED REMOTE DEPOSITION OF JENNIFER CHEN
Deponent testifying from Pomona, California
Friday, January 20, 2023

Friday, January 20, 2023

Volume I

Stenographically Reported By:

Melissa M. Villagran, RPR, CSR No. 12543
Job No. 5650070

PAGES 1 - 322

1 its privacy policy, right?

2 MS. WOOD: Objection to the form.

3 THE DEPONENT: I don't recall.

4 BY MS. SHARTON:

5 Q Well, let's take a look at it. 01:07:48

6 The language in Exhibit 44 says (as read):

7 "If you continue, you agree to the privacy policy
8 and the terms of service," right?

9 A That's what it says, yes.

10 Q Okay. 01:07:59

11 And you continued, right?

12 A Yes.

13 Q Okay.

14 So you told Flo you agreed to the privacy

15 policy and terms of service, correct? 01:08:04

16 MS. WOOD: Objection to form.

17 THE DEPONENT: Yeah, with regard to that,

18 yes.

19 BY MS. SHARTON:

20 Q Okay. 01:08:13

21 And have you ever read Flo's privacy policy?

22 A I may have looked at it the other night when
23 I was looking at some documents, but prior to that,
24 no.

25 Q That was the first time you've ever seen it, 01:08:34

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

*** CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER ***

VIDEOTAPED REMOTE DEPOSITION OF ERICA FRASCO
Deponent testifying from Riverdale, New Jersey
Monday, January 23, 2023

Volume I

Stenographically Reported By:

Melissa M. Villagran, RPR

CSR No. 12543

Job No. 5607745

PAGES 1 - 333

1 are links.

2 Do you see that?

3 A Yes.

4 Q Did you click on either of those links?

5 MR. LEVIS: Object to form.

03:12:21

6 THE DEPONENT: Privacy Policy.

7 BY MS. DERVISHI:

8 Q You clicked on Privacy Policy. Is that
9 correct?

10 A Yes.

03:12:26

11 Q Did you click on Terms of Service?

12 A I don't recall. If you had to click that to
13 move forward, then yes, but I don't recall clicking
14 Terms of Service.

15 Q Okay.

03:12:46

16 You continued beyond this screen, correct?

17 A Yes.

18 Q And by continuing, you told Flo that you
19 agreed to its privacy policy, right?

20 MR. LEVIS: Object to form.

03:13:03

21 THE DEPONENT: Yes.

22 BY MS. DERVISHI:

23 Q And you told Flo that you agreed to its terms
24 of service?

25 MR. LEVIS: Object to form.

03:13:08

1 THE DEPONENT: Yes.

2 BY MS. DERVISHI:

3 Q When you first read the privacy policy when
4 you first opened the app, how many minutes did you
5 spend reading the privacy policy?

03:13:23

6 A With any privacy policy, I do not read word
7 for word but I do skim through, and if there's
8 anything that stands out to me that looks as though,
9 you know, I don't agree with it, then I will stop.

10 But, as I'm sure you know, they are very long
11 and hard to, you know, be very clear and concise in
12 what they say. But yes, I do skim through.

03:13:41

13 Q So would you say you spent less than five
14 minutes reviewing the privacy policy?

15 A Yes.

03:14:02

16 MR. LEVIS: Object to form.

17 BY MS. DERVISHI:

18 Q Less than a few minutes?

19 MR. LEVIS: Object to form.

20 THE DEPONENT: I don't know the exact time
21 frame.

03:14:08

22 BY MS. DERVISHI:

23 Q And how -- you've used Flo for the last
24 five years now.

25 How frequently have you checked the privacy

03:14:18

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ERIC FRASCO, et al.,)
Plaintiffs,)
vs.) No. 3:21-cv-00757-JD
FLO HEALTH, INC., GOOGLE,)
LLC, FACEBOOK, INC., and)
FLURRY, INC.,)
Defendants.)

*** CONFIDENTIAL ***

VIDEOTAPED REMOTE DEPOSITION OF TESHA GAMINO
Deponent testifying from Costa Mesa, California
Thursday, December 8, 2022

Volume I

Stenographically Reported By:
Melissa M. Villagran, RPR
CSR No. 12543
Job No. 5594679
PAGES 1 - 377

1 an agreement.

2 Q Do you remember consenting to a privacy
3 policy back in 2016?

4 A I don't remember.

5 Q Okay.

06:37:13

6 You have to consent to the terms of an app
7 before you start using the app, right?

8 MS. GALLUCCI: Objection; form.

9 THE DEPONENT: Correct.

10 BY MS. SHARTON:

06:37:29

11 Q And that was true of Flo Health, right?

12 A Okay. Sure.

13 Q Yeah.

14 Why don't we just pull up and take a quick
15 look at the privacy policy that was in effect on
16 May 25, 2018. If -- that is Tab -- let me get my
17 glasses.

06:37:42

18 That is Tab 0. Tab 0, letter O?

19 MS. SHARTON: And if we could mark that as
20 the next exhibit, which I believe is 28.

06:38:06

21 (Exhibit 29 was marked for
22 identification and is attached
23 hereto.)

24 MS. SHARTON: 29?

25 29.

06:38:12

EXHIBIT D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ERICA FRASCO, et al.,)
Plaintiffs,)
vs.) No. 3:21-cv-00757-JD
FLO HEALTH, INC., GOOGLE,)
LLC, FACEBOOK, INC., and)
FLURRY, INC.,)
Defendants.)

*** HIGHLY CONFIDENTIAL ***

VIDEOTAPED REMOTE DEPOSITION OF AUTUMN MEIGS
Deponent testifying from Fredericktown, Ohio
Friday, January 6, 2023

Volume II

Stenographically Reported By:
Melissa M. Villagran, RPR
CSR No. 12543
Job No. 5653047
PAGES 182 - 324

1 objection in the middle of my question. You didn't
2 object a moment ago. This is on the readback. Let
3 the witness answer the question.

4 MR. WILLIAMS: I believe I did object. But
5 if not, I do object. Object to form. 03:14:04

6 THE DEPONENT: Sorry. Will you rephrase that
7 and ask a different way now because --

8 BY MR. SADUN:

9 Q Now, understanding how the Flo App works, can
10 we agree that you told Flo on the consent screen 03:14:24
11 that you have before you right now that you agreed
12 to its privacy policy?

13 MR. WILLIAMS: Objection to form.

14 THE DEPONENT: I guess so.

15 BY MR. SADUN: 03:14:41

16 Q And you also told Flo that you agreed to its
17 terms of service, correct?

18 MR. WILLIAMS: Same objections.

19 THE DEPONENT: Yes.

20 MR. SADUN: Let's take a break and go off the 03:14:57
21 record.

22 MR. WILLIAMS: Sure.

23 THE VIDEOGRAPHER: We are off the record.

24 The time is 3:15 p.m.

25 (Recess.) 03:15:07

EXHIBIT E

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 SAN FRANCISCO DIVISION

4

5 -----

6 ERICA FRASCO, et al.,)
7 Plaintiffs,)
8 vs.) No. 3:21-cv-00757-JD
9 FLO HEALTH, INC., GOOGLE,) (consolidated)
10 LLC, FACEBOOK, INC., and)
11 FLURRY, INC.,)
12 Defendants.)
13 -----)

14 *** CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER ***

15

16 VIDEOTAPED REMOTE DEPOSITION OF SARAH WELLMAN

17 Deponent testifying from Santa Rosa, California

18 Wednesday, January 11, 2023

19 Volume I

20

21 Stenographically Reported By:

22 Melissa M. Villagran, RPR, CSR No. 12543

23 Job No. 5607746

24

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1 Q Yes?

2 A Yes.

3 Q And it means you agree to the privacy policy,
4 right?

5 A Yes. 04:19:29

6 Q And the different color on terms of use and
7 privacy policy indicates a link, right?

8 A Yes.

9 Q Okay.

10 And that brought you to the actual terms of
11 use and the privacy policy, right? 04:19:36

12 MS. VILLEGRAS: Object to the form.

13 THE DEPONENT: I don't know.

14 BY MS. SHARTON:

15 Q Okay. 04:19:51

16 So you told Flo that you agreed to its
17 privacy policy, right?

18 A Yes.

19 Q And you told Flo that you agreed to the terms
20 of use, correct? 04:20:00

21 A Yes.

22 Q Okay.

23 And you testified that you don't recall one
24 way or another whether you read the Flo privacy
25 policy at any time, right? 04:20:17

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ERIC FRASCO, individually and on behalf of
all others similarly situated.

Plaintiffs.

V.

FLO HEALTH, INC., GOOGLE, LLC,
META PLATFORMS, INC., and FLURRY,
INC.,

Defendants.

[CIVIL] Case No. 3:21-cv-00757-JD

**PLAINTIFFS' OPPOSITION TO
DEFENDANT FLO HEALTH, INC.'S
MOTION IN LIMINE NO. 2 TO EXCLUDE
EVIDENCE AND ARGUMENT THAT
CONTRADICTS BINDING JUDICIAL
ADMISSIONS IN PLAINTIFFS'
COMPLAINT**

Date: June 26, 2025
Time: 1:30 P.M.
Judge: Hon. James Donato
Courtroom: 11 – 19th Floor, SF

1 Plaintiffs respectfully submit this brief in opposition to Defendant Flo Health, Inc.’s (“Flo”)
 2 Motion in Limine No. 2 (the “Motion” or “Mot.”). Flo claims to seek to “exclude evidence and
 3 argument from Plaintiffs that contradict . . . that they agreed to Flo’s Terms of Use and Privacy
 4 Policy.” Mot. at 1. While Plaintiffs do not disagree that there is a contract—indeed, they assert
 5 contract claims—the Parties dispute what those terms mean and which terms were binding. To the
 6 extent Flo’s Motion seeks to forbid evidence or argument as to the enforceability and meaning of
 7 the contract terms, Flo’s Motion must be denied. *See* Mot. at 2.

8 Flo asserts that Plaintiffs made admissions in their pleadings beyond that they were parties to
 9 the contract. Not so. Plaintiffs never conceded that every term of the contract was enforceable.
 10 Furthermore, it is black letter law that judicial admissions do not apply to legal conclusions. *See*
 11 *AdTrader, Inc. v. Google LLC*, 2019 WL 1767206, at *4 (N.D. Cal. Apr. 22, 2019) (judicial
 12 admissions “[are] not binding” with respect to “a legal question—such as contract interpretation”);
 13 *Nationwide Agribusiness Ins. v. George Perry & Sons, Inc.*, 338 F. Supp. 3d 1063, 1073 (E.D. Cal.
 14 2018) (declining to make an “inferential leap” from “cursory references” in the complaint to a “legal
 15 conclusion” on contractual terms); *A.F. v. Evans*, 2022 WL 1541463, at *4 (D. Or. May 16, 2022)
 16 (explaining “judicial admissions” do not apply to “legal conclusions” like negligence or breach).

17 Previously, Flo has sought to apply the doctrine of judicial admissions—not to establish
 18 facts—but to request that this Court accept certain legal conclusions in its favor. *See* ECF No. 536 at
 19 7-8, 12-13 (arguing its statute of limitations defense and that their assertions regarding Plaintiffs’
 20 actual notice could not be challenged because Plaintiffs referenced the *Wall Street Journal* article in
 21 their Complaint, using the adjective “bombshell”). Here,¹ Flo’s Motion is a disguised attempt to
 22 forbid Plaintiffs from arguing or presenting evidence on: (1) the contract’s scope; (2) the objective
 23 meaning of certain provisions; and (3) that certain provisions are non-binding under applicable law.²
 24 These are issues the Parties have adamantly disputed throughout this litigation. *See* ECF No. 64

25 ¹ Flo would not confirm whether it was seeking judicial admission of contract formation or seeking a
 26 broader request on the contract’s scope, meaning, and which terms were binding.

27 ² For instance, Flo’s class action waiver is unenforceable because it is unconscionable. *See* Order Re
 28 Class Certification, ECF No. 605 at 18; Summary Judgment Order Re Meta and Flo, ECF No. 608 at
 3.

¶ 39, 46, 60, 67, 81, 183 (alleging Plaintiffs and Class Members did not consent to Flo's conduct because Flo failed to disclose the full extent of its data practices in its privacy policies); ECF No. 536 at 15-18 (Flo's Motion for Summary Judgment arguing that the class action waiver in its terms is enforceable); *id.* at 4-7, 11-12 (arguing that Plaintiff's consented to its use of SDKs based on its meaning of provisions in its terms and privacy policies); ECF No. 560-3 at 18-22 (Plaintiffs' Opposition to Flo's Motion for Summary Judgment disputing the enforceability of the class action waiver and statute of limitations provisions in Flo's terms); *id.* at 5, 10-11 (arguing Plaintiffs did not, and could not, have consented to Flo's conduct).

Indeed, from the snippets of testimony Flo cites, it is clear Flo itself plans on arguing not just that there was a contract, but that Plaintiffs "consent[e]d to the terms[.]" Mot. at 2. There is no judicial admission, and no basis to preclude testimony or argument presented by Plaintiffs, on what **terms** are actually binding, their commonsense meaning, or which provisions are enforceable. These are disputed issues for the jury to decide.

Dated: June 11, 2025

/s/ Jake Bissell-Linsk

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